COUNTRYMAN & McDANIEL
MICHAEL S. McDANIEL [State Bar No. 66774]
cargolaw@aol.com
GEOFFREY W. GILL [State Bar No. 163621]
gwg@cargolaw.com
LAX Airport Center, Eleventh Floor
5933 West Century Boulevard
Los Angeles, California 90045
Telephone: (310) 342-6500
Facsimile: (310) 342-6505

Attorneys for defendant
HAAS INDUSTRIES, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO

ONE BEACON INSURANCE COMPANY, a corporation, Plaintiff, vs. HAAS INDUSTRIES, INC., a corporation, Defendants.	CASE NO. 3:07-CV-03540-BZ REPLY TO PLAINTIFF'S SUPPLEMENTAL MEMORANDUM REPLY DATE: April 18, 2008 SETTLEMENT CONF. DATE: June 11, 2008 TRIAL DATE: July 1, 2008

At the hearing upon plaintiff One Beacon's motion for summary judgment, One Beacon's counsel requested permission to file a supplemental brief in support of plaintiff's contention that a motor carrier, even after 1995 ICCTA, must maintain a tariff within prescribed guidelines of the ICC. This is the "first" of four pre-ICCTA conditions to have been met by a motor carrier if it successfully would limit its liability. *Hughes Aircraft vs. North American Van Lines,* 970 F.2d 609 (9th Cir. 1992), a household goods movement case. The court granted counsel's request and this is defendant Haas' reply to One Beacon's Supplemental Memorandum, filed April 8.

Post ICCTA case law demonstrates that the first Hughes "prong" relied upon by One Beacon as been replaced by the limited requirement that a non-household goods motor carrier need only maintain internally a schedule of rates, sometimes referred to as a "tariff," and upon the request of a shipper, provide to the shipper a written copy of the basis for the motor carrier's rates.

To set the stage properly, One Beacon's misdirected emphasis upon the term "tariff" needs to be addressed. See One Beacon's Supplemental Memorandum, page 4: "...tariffs must still be maintained ..." Contrary to One Beacon's urging, a "tariff" requires no talismaic formalism. In Tempel Steel Corporation vs. Landstar Inway, Inc. 211 F.3d 1029 (7th Cir. 2000), the court stated at page 1030: "Today carriers adopt standard contractual terms, which some call 'tariffs' out of habit, but which should have no effect apart from their status as contracts." A Tariff when, as here, is not required to be filed with a governmental agency, is no more than a listing of charges and the rules and practices upon which the charges are based. This is what Haas had available and would have provided to One Beacon, if requested. Holster decl., paragraph 3 and Exhibit "A" ("standard tariff") and paragraph 4 and Exhibit "B" ($.70 per $100.00 declared value extra freight charge). Exhibit "A" shows that the basic charge is derived by the shipment weight of 554 lbs. (Exhibit "C") being multiplied by a cost per pound determined by the number of "zones" crossed and number of days for delivery. Exhibit "B" shows that the extra charge for declared value was $.70 per $100 of value declared by the shipper on the bill of lading.

Returning to the point at issue, post-ICCTA case law emphatically states that the first prong no longer is applicable. Tempel supra at 1030-31: "The ICC Termination Act, ..., abolished the tariff filing requirement and the filed-rate doctrine, ... Carriers ... may set out schedules of values and prices, with higher charges for the transportation of more valuable cargo."

In its Supplemental Memorandum, One Beacon at page 3 argues by implication that Congress upholds the "first prong" by never acting to repeal it, citing *Emerson Electric Supply Company v. Estes Express Lines*, 451 F.3d 179 (3d Cir. 2006). However, Emerson in discussing Congressional intent is referring not to the first prong, but rather to multi-layered liability - the subject of the second and third "prongs." Emerson's consideration of the first prong is limited to footnote 6, in which the first prong test is described as having been altered, with the first prong only requiring that the carrier, if requested, provide the shipper with information upon which any rate is based.

We emphasize, for the purposes of this Reply, that Haas offered a tariff within the meaning of the altered first prong.

The several cases cited by One Beacon at page 4 of its Supplemental Memorandum upon examination do not support One Beacon's argument.

In IPEC Planar v. Mach 1 Air Services, Inc., 129 F.Supp,2d 1265 (D.Az. 2000), the first prong was satisfied where the motor

carrier makes its tariff available to shippers on request, as Haas would have done had Omneon so requested. Holster decl., paragraph 3. *IPEC* addresses several other issues raised by One Beacon. A $50.00 per shipment or $.50 per pound limitation was upheld upon a shipment valued at 3.5 million dollars, at 1267, and the cargo interest relied upon its general insurance policy to cover damage in transit (same page) rather than declare a value and pay higher freight charges.

Consolidated Freightways v. Travelers Insurance, 2003 WL 22159468 (N.D. Cal. 2003), upheld a first level limitation of $100,000.00, but denied a $1,000.00 limitation because as to the latter there was no evidence of reasonableness under the circumstances of the transportation, nor that a reasonable opportunity to choose between two levels of liability was given, and the carrier's limitation tariff was not incorporated into the bill of lading. The evidence in the case of bar, however, addresses each of these deficiencies:

1. Ms. Holster's declaration establishing the commonality of a $50.00 per shipment $.50 per pound limitation is rebutted only by a One Beacon showing that other limitation values may exist, but One Beacon offers neither evidence nor affirmation that Haas' limitation is unreasonable;

2. Application of the imitation, unless a higher value was declared and charges paid, provided the shipper a choice

between two levels of liability; and

3. The face of Haas' bill of lading offered the shipper an alternative to limited liability which the shipper declined, so an incorporation argument is irrelevant.

Shielding International, Inc. v. Oak Harbor Freight Lines, 442 F.Supp.2d 1092 (D.Or. 2006), is simply wrong on the law in its statement that all the Hughes requirements must be met - the Shielding court fails to discuss the first prong; and had it done so, the court presumably would have seen (and corrected), its error. Perhaps the problem lies in the fact that as stated in One Beacon's Supplemental Memorandum the citation of the Hughes factors was "by rote" rather than analytical.

Additional case authority further supports Haas' position. In *Travelers Property v. A.D. Transport*, 2007 WL 2571957 (D.N.J.), the court stated that as to motor carriers, such as Haas, the first prong has been replaced, such that the carrier need only "provide to the shipper upon request a written copy of the basis for its rate [,]" citing *Emerson*, and enforced as apparently "reasonable under the circumstances of the transportation" alternative limitations of $50.00 per shipment or $.50 per pound. Also holding the motor carrier to the same obligation to provide upon request a written copy of a basis for its rate is *Diamond Transportation Group, Inc. v. Emerald Logistics Solutions, Inc.*, 2006 WL 1789036 (E.D.Pa.).

Dated: April 18, 2008

COUNTRYMAN & McDANIEL
MICHAEL S. McDANIEL
GEOFFREY W. GILL

By: _____
GEOFFREY W. GILL
Attorneys for defendant
HAAS INDUSTRIES, INC.